Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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TABLE OF CONTENTS

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MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") on Policies Regarding Mobile Spectrum Holdings, released by the Commission on September 28, 2012.[2] The following is respectfully shown:

I. INTRODUCTION AND SUMMARY

MetroPCS applauds the Commission's decision to open this proceeding and to seek comments on the important issues regarding its mobile spectrum holdings policies. This action properly emphasizes the significant role that spectrum plays in the communications marketplace – most notably, the effect on competition. The *NPRM* correctly observes that "[a]ccess to spectrum is a precondition to the provision of mobile wireless services,"[3] and, as a result, the

[1] For purposes of these Comments, the term "MetroPCS" refers collectively to MetroPCS Communications, Inc. and all of its FCC license-holding subsidiaries.

[2] *In the Matter of Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking (rel. Sept. 28, 2012) ("*NPRM*").

[3] *NPRM* ¶ 4.

Commission has worked through the years to ensure the availability of sufficient spectrum to industry participants.

Since the Commission's last comprehensive review of its mobile spectrum holdings policies almost a decade ago, the mobile communications marketplace has undergone significant changes, including the expansion of the number of spectrum bands used for wireless services, the introduction of new and innovative service offerings and devices, and an increase in consumer demand for a wide array of bandwidth-intensive applications. The wireless industry also has undergone major consolidations. For example, in 2003 there were six nationwide mobile telephone operators and now, as a result of mergers and other FCC-approved transactions, there are four nationwide providers. This is a trend that many analysts expect will continue and perhaps, accelerate. Additionally, the market power of the two largest carriers has increased dramatically with AT&T and Verizon now controlling a combined 70% of the wireless market.[4]

As a result of this industry transformation, the availability of spectrum has become increasingly critical for wireless service providers. And, in the face of a severe spectrum crunch, enlightened spectrum policies now play a more significant role than ever as the Commission assesses the impact of proposed spectrum acquisitions on competition. Unfortunately, the current spectrum screen has been formulated and applied in a manner that creates too much uncertainty for both the Commission and industry participants concerning spectrum aggregation. Since the trend of industry consolidation is continuing, the time is ripe for the Commission's spectrum screen analysis to be updated and refined. Unlike some others, MetroPCS does not

[4] Marguerite Reardon, *Competitive Wireless Carriers Take on AT&T and Verizon*, CNET.com (Sept. 10, 2012), http://news.cnet.com/8301-1035_3-57505803-94/competitive-wireless-carriers-take-on-at-t-and-verizon/.

believe that the general case-by-case approach should be abandoned. But, rather than modifying the screen on an *ad hoc* basis in the context of each major acquisition transaction, the spectrum screen should be revisited in each rulemaking proceeding in which the quantity of spectrum available for broadband use in the near term is materially affected.[5] Specifically, when additional spectrum is made available for wireless broadband use, the Commission should ascertain – in the course of the allocation process – whether, when and how the spectrum will be added to the screen. This would give all interested parties a fair opportunity to comment. Furthermore, the spectrum screen should be used to evaluate all instances in which an incumbent is gaining access to spectrum, including secondary market transactions, auctions and leases.

The Commission should follow several guiding principles when revising the spectrum screen. First, the Commission must strike a balance between adding certainty to the process and maintaining flexibility to deal with a rapidly changing market. Currently, there is a lack of certainty due to the *ad hoc* approach in which the allowed spectrum aggregation is altered in the context of specific, but isolated, transactions. This approach fails to provide meaningful guidelines to market participants. There also must be sufficient flexibility built into the process to ensure that it is "future-proof" and can be applied on an ongoing basis without the need for constant revisions, thereby adding needed certainty. Second, the Commission must strike a delicate balance between promoting competition and allowing carriers with growing customer bases and network usage to acquire additional spectrum on a timely basis. This balance will require that the Commission adopt standards to ascertain whether a carrier is deploying existing spectrum resources in an efficient and effective manner. Finally, in keeping with the

[5] This would include proceedings in which the licensee of previously allocated spectrum is given increased flexibility to put it to beneficial use.

Commission's recognition that clear and predictable "rules of the road" are necessary to "promote the competition needed to ensure a vibrant, world-leading, innovation-based mobile economy," the spectrum holdings policies and standards under consideration by the Commission in this proceeding need to be settled as soon as practicable and articulated as precisely as possible, so carriers are afforded reasonable certainty in advance as to what the "rules of the road" will be.

The Commission also needs to revise the process by which the spectrum screen is applied after it is triggered. In future instances where the spectrum screen is implicated, any party seeking to acquire spectrum above the spectrum screen should be required to demonstrate a substantial need for the spectrum that cannot be satisfied from existing resources. The burden also should shift. Rather than having the FCC conduct an analysis of competitive harm, there should be a rebuttable presumption that competitive harm exists if the spectrum screen is exceeded. Potential spectrum-acquiring parties should have the burden of proof to rebut this presumption and demonstrate that their acquisition of spectrum over the screen will not result in competitive harm, and is in the public interest. MetroPCS recommends several factors the Commission should consider while evaluating such rebuttals, including the effect on competition, the extent to which the proposed acquirer is using its existing spectrum resources efficiently, and the nature of the participant's spectrum holdings and uses. MetroPCS also recommends that the attribution rules be revised so that spectrum is only attributable to a party which has *de jure* or *de facto* control over the subject spectrum.

Finally, MetroPCS cautions that the spectrum screen policy should not supplant the broader public interest analysis the Commission makes when reviewing an application for access to spectrum. Even if a transaction does not require further analysis pursuant to the spectrum

screen, the Commission must still make the requisite finding that the transaction is in the public interest.

II. THE CASE-BY-CASE SPECTRUM SCREEN APPROACH NEEDS TO BE MODIFIED BUT NOT ABANDONED

The Commission regulates the mobile marketplace with an important objective in mind – preserving and encouraging competition. Over the past three decades, the Commission has allocated spectrum and established rules with a conscious effort to "guarantee the competitive nature of the cellular industry and to foster the development of competing systems,"[6] as well as to ensure the preservation of "incentives for efficiency and innovation."[7] In the process, the Commission consistently has sought to increase the amount of spectrum available for the provision of advanced mobile wireless services in the face of evolving industry demands and to prevent the concentration of spectrum in the hands of only a few licensees.[8] Nonetheless, several factors present challenges to the Commission's efforts to meet these goals. First, at any given time there is a finite amount of spectrum that can be productively dedicated to broadband wireless services and, at present, the well of unallocated useable spectrum has run completely dry. Second, consumers are demanding even more spectrum intensive services, particularly data

[6] The Commission's intent behind the 1991 Cellular Cross-Interest Rule was to preserve and foster competition. *See Amendment of Part 22 of the Commission's Rule to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, CC Docket No. 90-6, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, 6628 ¶ 104 (1991).

[7] The Commission believed that such incentives resulted from the implementation of the spectrum cap. *NPRM* ¶ 7; *see Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8100 ¶ 238, 8109 ¶ 263 (1994).

[8] *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, ¶ 266 (rel. June 27, 2011) ("*15th Mobile Wireless Competition Report*").

services, and their usage of these services is skyrocketing. And, third, a trend of industry consolidation has resulted in a concentration of spectrum, including considerable amounts of unused spectrum, in the hands of the largest nationwide carriers.

The *NPRM* notes that, over the past decade, two nationwide carriers departed the marketplace as a result of mergers and other transactions.[9] These departures were followed by a series of smaller, but still significant, consolidation transactions of regional and super regional carriers.[10] Some included the acquisition of spectrum, operating networks and customers. Others only involved spectrum licenses.[11] And, when the Commission succeeded in reallocating spectrum by auction for mobile broadband use, the unfortunate tendency was to adopt band plans, license areas and auction procedures that strongly favored the largest carriers.[12] The result is that the two largest nationwide mobile wireless service providers –AT&T and Verizon – now control large swaths of spectrum – which has increased their dominant positions in the industry and, in many instances, has left competitors spectrum starved in key areas. The Commission claims to realize that "different spectrum holdings of major providers potentially affect their

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[9] *NPRM* ¶14. The two nationwide carriers which departed the landscape were Cingular and Nextel.

[10] *15th Mobile Wireless Competition Report*, ¶ 283. The *NPRM* notes that "since 2003, a number of regional and rural facilities based providers have exited the marketplace through mergers and acquisitions, including Dobson Communications, SunCom Wireless, Rural Cellular Corporation, ALLTEL, and Centennial Communications." *NPRM* ¶ 14.

[11] For instance, in 2012 Verizon acquired AWS-1 licenses from SpectrumCo and Cox and in 2011 AT&T acquired nationwide lower 700 MHz downlink spectrum from Qualcomm. *See e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses,* Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 (2012) ("*Verizon/SpectrumCo Order*"); *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589 (2011) (*"AT&T/Qualcomm Order*").

[12] The clearest example is the 700 MHz auction, in which the combination of large channel blocks, large geographic license areas and combinatorial bidding resulted in an auction completely dominated by the two largest carriers, AT&T and Verizon.

ability to compete effectively."[13] Indeed, Chairman Genachowski has noted on several occasions that "spectrum is the lifeblood of the wireless industry."[14] Yet, ironically, the undue concentration of spectrum has occurred during a time when the Commission had in place a spectrum screen that was intended to allow the Commission to guard against an undue concentration of spectrum and excessive market power.

Given this situation, the threshold question the *NPRM* poses is easily answered: yes, the current spectrum aggregation policy needs to be revisited and changed. As the *NPRM* properly notes, the approach the Commission has employed of late to review spectrum aggregation and foster competition in the mobile wireless industry has been a case-by-case analysis that examines the competitive effects of proposed wireless transactions that involve the transfer, assignment or lease of Commission licenses.[15] This two-part screen examines changes in market concentration and the change in the Herfindahl-Hirschman Index (HHI) as a result of the transaction. It then requires the Commission to examine the amount of spectrum that is suitable and available on a market-by-market basis to determine whether the transaction would result in an increased likelihood or ability for the combined entity to behave in an anticompetitive manner in those triggered markets.[16]

On balance, MetroPCS concludes that the Commission's current case-by-case approach is appropriate, but needs to be modified. One alternative – a rigid spectrum cap, which would add certainty and predictability – is not suited to the dynamic, ever-changing wireless

[13] *15th Mobile Wireless Competition Report*, ¶ 286.

[14] Prepared Remarks of Chairman Julius Genachowski, "Innovation in a Broadband World," The Innovation Economy Conference, Dec. 1, 2009.

[15] *NPRM* ¶ 8.

[16] *Id.*

marketplace. Further, a rigid cap would no doubt become outdated and outlive its usefulness just as it previously did, when the Commission abandoned the prior cap in 2003. Indeed, the Commission started in 1994 with a strict 45 MHz cap, then increased it to 55 MHz in 1999, and then abandoned it in favor of a more flexible case-by-case approach in 2003.[17] The same evolution seems inevitable if the Commission today heeds any calls for a bright line limit for spectrum. Thus, the current flexible case-by-case approach is better suited to a dynamic industry, like the wireless industry. The case-by-case approach allows the Commission to take into consideration the current market conditions in making its assessment of whether to approve the transaction. This allows the Commission to be flexible, yet address competitive issues as they arise. For example, last year, this approach allowed the Commission to conclude that the AT&T/T-Mobile transaction would cause competitive harm, while allowing the AT&T/Qualcomm transaction to proceed.[18]

This does not mean that the current flexible case-by-case approach is not without problems which need to be addressed. The *NPRM* correctly points out that the Commission "generally has reviewed and, when necessary, adjusted its case-by-case analysis to reflect changing industry and consumer needs" during its consideration of major acquisitions.[19] This is one of the major flaws with the current process: the screen constantly is adjusted on an *ad hoc* basis *during* transactions. As a consequence, parties do not know the "rules of the game" in advance, and both carriers and competitors face uncertainty and a lack of predictability in analyzing whether a transaction is feasible. And, potentially industry-affecting changes in the

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[17] *NPRM* ¶ 7.

[18] *See generally, In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-1955, Order (rel. Nov. 29, 2011); *AT&T Inc/Qualcomm Order*.

[19] *NPRM* ¶ 9.

screen are implemented with input only from the few interested parties who have weighed in on the particular transaction. Thus, the Commission does not get the "big picture" view that would be fostered by a notice and comment rulemaking proceeding in which all interested parties are eligible to participate. Further, transactions that run into problems during the screen analysis often are salvaged by transaction-specific conditions based upon the narrow focus of the parties and the particular transaction, rather than on the broader public interest focus that might come from a robust rulemaking inquiry. This transaction-specific focus often means that issues are raised and resolved based on the specific spectrum holdings of the parties. For example, in the Verizon-SpectrumCo transaction, the primary focus was on the AWS spectrum; in the AT&T/Qualcomm transaction, the sole focus was on 700 MHz spectrum.[20] Such a narrow focus may mean that other broadband spectrum held by the parties is ignored when it should be taken into consideration, such as WCS spectrum in connection with the AT&T/Qualcomm transaction. In sum, the narrow focus resulting from *ad hoc* rules that are modified and applied in the context of each specific transaction tends to create a policy that lacks predictability and general applicability.

Therefore, MetroPCS proposes that any substantive policy decision that will materially affect the quantity of spectrum available for broadband use in the near term (i.e., spectrum allocations or reallocations, rule changes adding broadband usage flexibility, auctions, etc.) should specifically include a separate analysis of the impact on the spectrum screen. By doing so, industry participants will be afforded an opportunity before the spectrum is allocated to comment on the usability of the spectrum and the applicability of the screen. For example, when

[20] *See generally Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent to Assign AWS-1 Licenses,* WT Docket No. 12-4; *Applications of AT&T Inc, and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations,* WT Docket No. 11-18.

the Commission adopted the AT&T/SiriusXM *Order* allowing more flexible use of 20 MHz of WCS spectrum,[21] the Commission should have determined – with input from all interested parties – how the enhanced spectrum would be considered for the purposes of the spectrum screen. Instead, both the licensees and potential other parties were left to guess whether the spectrum would be added to the screen and, if so, when.

Similarly, when the Commission allocated the 700 MHz spectrum, it should have decided in advance during the rulemaking proceeding how the spectrum screen would be altered rather than making that decision in the context of a pending transaction in which 700 MHz spectrum was in play.[22] Other issues to be resolved are when the spectrum would likely be usable, when the screen would apply and what the impact on the screen should be. Further, the Commission needs to consider how spectrum that is not immediately placed in the screen will be handled when the screen does apply. Simply stated, any future *NPRM* that will materially affect the quantity of spectrum available in a definable period for wireless broadband use should assess and resolve the impact the change will have on the current spectrum screen and determine when, if at all, such spectrum would be placed in the screen. This will avoid having to address such issues after the fact in the context of specific transactions and, thus, provide industry participants with more certainty and a better understanding of the "rules of the road."

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[21] *In the Matter of Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293; IB Docket No. 95-91, Order on Reconsideration (rel. Oct. 17, 2012).

[22] *In the Matter of Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations,* WT Docket No. 07-153, Memorandum Opinion and Order, ¶ 17 (rel. Nov. 19, 2007) (updating the initial spectrum screen to include 700 MHz spectrum "given its availability and suitability on a nationwide basis for the provision of mobile telephony services. As a result, our initial spectrum screen for the proposed transaction is 95 MHz, rather than 70 MHz that we previously have used.")

III. PARTIES SEEKING TO ACQUIRE SPECTRUM ABOVE THE SPECTRUM SCREEN MUST BEAR THE BURDEN OF PROOF

One way to meet the dual objectives of maintaining flexibility through the case-by-case analysis while increasing certainty is to set the screen so that it is triggered only in circumstances where a proposed addition of spectrum to a carrier's existing holdings will materially affect the quantity of spectrum available to competitors. In instances when the spectrum screen is exceeded, there should be a rebuttable presumption that the acquisition of spectrum will not serve the public interest. The acquirer would then have the burden of proof that a grant of the acquisition request would not result in competitive harm, and would be in the public interest.

The proposed rebuttable presumption will make clear who has the burden to demonstrate that a proposed transaction will not result in competitive harm. Indeed, one of the criticisms of the current screen process is that it is not clear what legal standard will be applied when a transaction is subject to a heightened degree of scrutiny. And, a sufficient number of transactions have been approved despite the fact that they trigger the screen, which causes the screen to lose substantive meaning. The number of transactions that have been subject to scrutiny, only to be approved, also has led to criticisms that the current screen process is too time- and resource-intensive.[23] Going forward, the Commission should establish a rebuttable presumption that competitive harm exists if the spectrum screen is reached. The party seeking to go above the spectrum screen would have the burden of proof to demonstrate that the transaction at issue will foster competition in the industry and a failure to do so would mean that the transaction would not be in the public interest.

In assessing whether a proponent has met its burden, the Commission should consider and balance a number of factors. As the Commission has done in the past in other contexts, the

[23] *NPRM* ¶ 8.

Commission should, to the extent possible, articulate the important factors in advance in an effort to afford parties a greater deal of certainty when they are considering a proposed transaction.[24] MetroPCS suggests that the Commission should consider, at a minimum, the following factors:

Competition: Preserving and promoting wireless competition has been and must remain a key goal of the Commission. Therefore, in any evaluation connected with the spectrum screen, the nature and extent of competition should be explored both before and after the proposed transaction. This factor will be similar to the Commission's current review and determination of whether the transaction would result in an increased likelihood or ability for the combined entity to behave in an anticompetitive manner. This factor also should cover the amount of spectrum that is or may be available for competing service providers. Consider, for example, two markets in which the screen is triggered. In one, the remaining spectrum is roughly equally divided among and between a series of competitors. In the second, one large competitor holds a major portion of the remaining spectrum (even though the screen is not triggered by its holdings on a stand-alone basis). This second market presents a much greater competitive concern because experience dictates that large incumbents are unlikely to divest spectrum in these circumstances, meaning that competitors have fewer options to satisfy spectrum needs. And, the competitive analysis also should continue to include a review of the HHIs before and after the transaction, as this is a useful tool to determine market concentration.

A related competitive issue is whether the party acquiring the spectrum is a dominant incumbent in the market, a smaller competing carrier or a new entrant. As is discussed in greater

[24] For example, in the roaming context, the Commission has specified a series of factors that it will take into consideration in ascertaining whether a denial of roaming rights is justifiable. *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, ¶ 86 (rel. April 7, 2011).

detail below, tension exists when fostering competition precludes successful carriers from acquiring the spectrum they need to meet growing demands for service. Incumbent licensees need additional spectrum to increase their coverage and capacity and meet customer demands, while new entrants need access to spectrum in order to have a fair opportunity to compete effectively in the industry. Indeed, the Commission has recognized that "[e]nsuring that sufficient spectrum is available for incumbent licensees, as well as for entities that need spectrum to enter the market, is critical for promoting competition, investment, and innovation."[25] Thus a searching review of the standing and character of all of the market participants is in order to properly assess the impact of a particular spectrum acquisition on the market. The Commission must ensure that the spectrum screen does not prevent spectrum-constrained incumbent licensees from obtaining more spectrum if they need it, nor should it prevent new entrants from having a chance to participate competitively.

Efficient Use of Already-Licensed Spectrum: The Commission should consider the extent to which the potential acquirer is using its existing spectrum resources efficiently. An incumbent licensee with a large spectrum position, well developed operating systems and a large and growing customer base should not be penalized by being denied additional spectrum for which it has a substantial need. Rather, an incumbent should be eligible to acquire additional spectrum in excess of the screen, based upon a clear and convincing showing of need.

Notably, this is not the first time that the wireless industry has faced a spectrum shortage. Not long before the development of the 800 MHz cellular band, spectrum above the 450 MHz UHF band was not considered to be well-suited for wireless services because of limits on range and building penetration. And, at that time, there was a shortage of prime VHF (150 MHz band)

[25] *15th Mobile Wireless Competition Report*, ¶ 266.

and UHF (450 MHz) spectrum. The Commission responded by requiring incumbents seeking additional channels to demonstrate a substantial unsatisfied need for additional spectrum by submitting traffic studies reflecting their use of their existing spectrum resources.[26]

Not surprisingly, several applicants for broadband spectrum in the recent past have sought to get out from under the screen by asserting that they are efficient users of spectrum. MetroPCS agrees with this approach. However, the Commission has not explicitly adopted such a factor, nor has it set forth any policies or standards that are or should be used to evaluate these efficiency claims. This can lead to anomalous results, depending on how the respective parties calculate utilization of spectrum. The time has come for the Commission to adopt spectrum utilization standards so that applicants who have spectrum above the screen are able to demonstrate that they are putting their current spectrum to efficient use, and need more spectrum, according to an articulated industry standard. This focus also will help the Commission guard against spectrum warehousing by licensees. The spectrum utilization standard should be applied on a sufficiently granular basis (*e.g.*, less than nationwide) to ensure that it reflects actual utilization.

Nature of the Participant's Spectrum Holdings and Uses: The Commission previously has recognized that several frequency bands are suitable for mobile broadband services, but the different characteristics of particular channels "affect how they can be used to deliver mobile services to consumers."[27] For instance, spectrum below 1 GHz could provide a greater range of coverage, while spectrum above 1 GHz could provide greater capacity and reuse in a small cell

[26] *See* 47 C.F.R. § 2.516 (1993). This rule required an incumbent paging or mobile telephone operator seeking to add additional channels to the system to provide a traffic loading study on the existing system, showing the channel occupancy during peak usage periods over several days within 60 days prior to the filing date of the application.

[27] *15th Mobile Wireless Report*, ¶ 290.

configuration. Thus, attention to the character of a participant's spectrum holdings, and the existing and proposed uses of it, are important considerations in determining whether a licensee should be allowed to acquire more spectrum.

Spectrum efficiencies also can be achieved when carriers are able to aggregate significant blocks of contiguous spectrum, and when a carrier is adding spectrum in a new market that is in the same band as spectrum holdings in other markets. MetroPCS continues to favor the initial allocation of spectrum by auction in smaller blocks and smaller license sizes so that a greater number of applicants can participate meaningfully in each auction. This is, in part, because MetroPCS believes that the secondary market works in a manner that will allow carriers to assemble needed spectrum in a building block fashion. Thus, it is appropriate for the Commission to consider spectrum efficiencies as a factor in evaluating whether a spectrum acquisition exceeding the screen should be approved.

Another important consideration in terms of the efficiency of existing spectrum uses is to consider the extent to which a carrier is using advanced technology, and an intelligent technology migration path, to meet customer needs. Sometimes, the cheapest way to expand is to keep legacy systems in place beyond their natural life cycle and to roll out advanced, next-generation technology on different spectrum. However, in a marketplace where spectrum is in critically short supply, this approach cannot be encouraged. So the Commission must take a holistic approach in which the entire spectrum picture and the universe of alternative uses is considered to evaluate a proposed spectrum acquisition.

Finally, the Commission should consider whether an acquisition of spectrum would concentrate spectrum in a particular band into the hands of a single or a few licensees. As the Commission knows, there is considerable concern by new entrants and small, rural and mid-tier

carriers about interoperability resulting from the concentration of spectrum in the 700 MHz band in such a way as to allow licensees to have market incentives to forego interoperability. The Commission must consider whether the acquisition of spectrum in a particular band may give a licensee an incentive to act in an anti-competitive way.

MetroPCS submits that its proposed rebuttable presumption approach triggered by a higher screen threshold will mitigate the uncertainty problems that are embedded in the current case-by-case approach. Permitting a party seeking to acquire spectrum over the screen to defend its position using well articulated review guidelines not only will allow for a more standardized and less resource intensive approach, but it also will afford greater certainty for industry participants.

IV. THE SPECTRUM SCREEN SHOULD BE UTILIZED TO EVALUATE ALL SPECTRUM ENHANCING SITUATIONS

Assuming that the spectrum screen is set in a manner that fulfills the above-stated objectives, it should be used to evaluate all situations in which carriers are seeking to add to their usable spectrum resources. Thus, it should not only be applied to secondary market transactions in which carriers are seeking to acquire spectrum licenses or licensees, but also to auction transactions and other spectrum access arrangements, including leasing arrangements, where the company is gaining near term use of wireless broadband spectrum.

Modifying the screen as advocated above by MetroPCS is particularly important in the auction context. Applicants who must submit payment for licenses in which they are the high bidder at auction before long-form applications are processed and granted are entitled to greater certainty so that they can make rational bidding decisions in the course of the auction. No one is served by having auctioned spectrum lie fallow for extended periods of time while post-auction protests are being played out against a backdrop of indefinite eligibility standards.

One area requiring careful consideration is how the Commission will treat spectrum that is not available immediately for use but will become available in a foreseeable timeframe. Failing to include such spectrum in the spectrum screen could allow a bidder to acquire spectrum at auction that it would not be able to acquire later. While this incents bidders to bid more and to invest resources to clear spectrum, it does increase the risk in the future that spectrum could become unduly concentrated. This is a particular risk since large incumbents have the greatest financial ability to hold onto spectrum for future use. AWS is a case in point. AWS spectrum was not put in the spectrum screen when first auctioned because it had to be cleared, and thus would not be available in the near term. Thus, if Verizon had wanted to acquire the lion's share of the AWS spectrum in Auction 66, the Commission rules would not have precluded it. Yet, when Verizon later wanted to acquire an additional 20 MHz of AWS spectrum, the screen was reached and ultimately the Commission fostered divestitures. The Commission should seriously consider whether the initial decision to keep AWS out of the screen was appropriate since it could have allowed a concentration of spectrum later found to be problematic.

V. THE SPECTRUM SCREEN SHOULD NOT SUPPLANT THE COMMISSION'S PUBLIC INTEREST ANALYSIS

The Commission must recognize that the spectrum screen only addresses one aspect of the public interest analysis – the extent to which an acquisition affects the fair distribution of spectrum licenses. As noted above, MetroPCS supports a modification of the Commission's current case-by-case analysis to add clarity and predictability to the analysis. Nonetheless, MetroPCS strongly urges the Commission to continue to conduct its searching public interest analysis of other aspects of a proposed acquisition. The fact that a particular transaction does not require further analysis pursuant to the spectrum screen does not mean that the transaction otherwise is in the public interest. For example, the spectrum screen focuses on the distribution of critical spectrum resources and not on the market power of a company. The Commission still

will have to consider the transaction's effect on market power in order to make the requisite public interest analysis.

And, there may be other aspects of licensee behavior that merit consideration. For example, the public interest might not be served by allowing a carrier who consistently has resisted entering into roaming agreements on reasonable terms to acquire additional spectrum even if the transaction does not implicate the spectrum screen. The point is that the spectrum screen should not supplant other aspects of the Commission's traditional public interest analysis.

VI. ATTRIBUTION

MetroPCS recommends that the Commission revise its spectrum attribution rules. Specifically, MetroPCS proposes that the Commission revise its attribution rules such that spectrum is attributable to a party only when such party has *de jure* or *de facto* control over such spectrum.

The Commission correctly acknowledges that, regardless of the approach taken, attribution rules are still needed "to determine which of a licensee's spectrum interests counts toward that licensee's total mobile spectrum holdings."[28] However, the current 10% attribution rule dates backs to the early days of the wireless business when there were only two licenses in a market, and the Commission needed to ensure that a company could not, so to speak, have bet on both sides of the line. The current rule is unduly limiting, as it is unlikely that a 10% non-controlling stake in a wireless company, absent other factors, would give that stakeholder any meaningful influence over the licensee.[29] The better approach would be to focus on a licensee's controlling interest and only those non-controlling interests that result in *de facto* control.

[28] *NPRM* ¶ 40.

[29] The Commission may, though, want to consider whether the two carriers with dominant market power should be subject to a more stringent attribution test than those who do not have as

Again, this will add certainty to the analysis and avoid debates over whether a non-controlling interest enables a party to "influence" a licensee. Notably, since MetroPCS expects the Commission to maintain the authority to review transactions under its public interest mandate regardless of whether such transaction meets the spectrum screen, it will retain the power to investigate if there is reason for concern that a carrier is seeking to circumvent the intent of the rule by acquiring substantial non-controlling interests in spectrum.

VII. CONCLUSION

The Commission is on the right path to protect the competitive future of the wireless telecommunications industry. This proceeding is an important and necessary step in doing so. Modifying the current case-by-case approach as suggested by MetroPCS, will better equip the Commission to evaluate spectrum transactions, and will provide industry participants with a stronger understanding of the Commission's expectations regarding spectrum aggregation. MetroPCS submits that the modifications presented in these Comments will provide greater certainty to industry participants, and ensure that available spectrum is put to efficient use.

Respectfully submitted,

MetroPCS Communications, Inc.

/s/ Carl W. Northrop

By:
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much power. Clearly, the risk that a 10% shareholder will exercise influence increases when the shareholder is a dominant market player with substantial financial and other resources (*e.g.* the ability to dictate roaming terms). For this reason, the Commission should apply a stricter attribution rule to transactions involving AT&T and Verizon Wireless. The Commission need not keep in place the current 10% rule to do so; it could merely take such factors into consideration in its spectrum screen analysis as another factor.

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